the two sections, under one of which there is a maximum sentence of seven years and under the other a maximum sentence of five years. Having done that, having taken all that into consideration and taking into consideration some previous convictions, he sentenced him to three years' imprisonment.

The point I am now asked to consider is whether the learned District Judge may have thought or may reasonably be inferred to have thought that he should in passing sentence take into consideration the totality of the matter, that is, the two sentences that could be passed and then arrive at some appropriate figure. If he did that I think that would have been a mistake.

Learned Crown Counsel says that I should not infer that he did; I am bound to say, however, that in my opinion the inference which it is reasonable to draw in that passage from the learned District Judge's judgment is that he did think that the proper way to assess the sentence was to take into consideration the two alternative sentences and then arrive at an answer which would appear to consider both.

It is quite true, as Mr. Saurajen says, that if one were deciding this matter *de novo* that one certainly would not say that a sentence of three years' imprisonment was excessive, certainly not manifestly excessive and there are many people who would say it is not excessive at all. But I think in a matter of this kind the proper test is what the learned District Judge himself would have done or can be reasonably inferred to have done, had he applied the right test; and if he had applied the right test I think it would follow that he must inevitably, if his mind was working logically, have imposed some terms of imprisonment of less than three years.

It is difficult, of course, to speculate what exact term he would have fixed upon but I think this is a sort of point that an appellant in a criminal court is entitled to avail himself of and I think that making a guess at it the reasonable thing is to reduce the sentence to one of two years' imprisonment.

I would add a further smaller point that the learned District Judge appears to have taken into consideration, a previous conviction in Johore Bahru. That may have been technically incorrect but I do not think that it affected his mind one way or the other because the matter appears to have been treated by the Magistrate there as a very minor affair, a small fine only having been imposed; and had it not therefore been for the other point with which I have dealt I should not have thought it necessary to alter the sentence in view of that slip on the part of the District Judge.

The appeal is allowed in the sense that the sentence is reduced from one of three years to one of two years' imprisonment, to date from the date of convictions.

Sentence reduced.

KECHIK & ORS. v. HABEEB MOHAMED & ANOR.

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) October 29, 1962]

[Penang — F.M. Civil Appeal No. 24 of 1962]

Landlord and Tenant — Sub-tenancies granted by widow of tenant before grant of letters of administration — Contracts of sub-tenancies for benefit of estate — Administratrix de son tort — Doctrine of relation back on becoming administratrix.

Landlord and Tenant — Deceased a monthly tenant — Whether tenancy terminated by death — Vesting of tenancy on death of tenant — Notice to widow treating her as trespasser — Whether notice to quit.

Landlord and Tenant — Notice to quit on subtenants — Irregular.

Costs — Surplus matter in Record of Appeal — Disallowance.

The first defendant, the widow of a deceased tenant of the premises in dispute granted sub-tenancies of portions of the premises to the second and third defendants in April and June 1958. She applied for letters of administration to her deceased husband's estate and same was granted on December 14, 1958 and extracted on May 18, 1960.

The plaintiffs, on assuming the administration of the deceased owner's estate, found the second and third defendants in occupation of the premises and thereupon instructed their solicitor to send a notice to quit addressed to them. On July 21, 1959 the plaintiffs' solicitor wrote to the 1st defendant demanding a full account of the rents collected by her and treating her as a trespasser. On August 18, 1959 the plaintiff issued a writ claiming possession of the premises.

Held: (1) the 1st defendant in granting the sub-tenancies to the 2nd and 3rd defendants prior to letters of administration being granted or extracted was administering the estate of her deceased husband for the benefit of the said estate. Her appointment as administratrix subsequently related back so as to enable her to grant valid sub-tenancies to the 2nd and 3rd defendants;

(2) the contractual monthly tenancy of the deceased tenant had not been terminated by his death or the letter of July 2, 1959 as it was not a notice to quit.

Cases referred to:—

(1) *Meyappa Chetty* v. *Supramanian Chetty* [1916] 1 A.C. 603, 608.
(2) *Foster* v. *Bates* 12 M. & W. 226 p. 233.
(3) *In the goods of Khoo Chow Sow* 2 Ky. Ecc. 22.
(4) *Egerton* v. *Rutter* [1951] 1 T.L.R. 58, 61.
(5) *Sweeney* v. *Sweeney* (1876) I.R. 10 C.L. 375, 379.
(6) *Rees* v. *Perrott* (1830) 4 C. & P. 230.
(7) *Pleasant, Lessee of Hayton* v. *Benson* (1811) 14 East 234.

COURT OF APPEAL.

S. Thillaimuthu for the appellants/defendants.

Ong Huck Lim for the respondents/plaintiffs.

Cur. Adv. Vult.

Thomson C.J.: The plaintiffs in this case are the administrators of the estate of one K. M. Pitchay who died intestate in India on 30th April, 1958, and who at the time of his death was the owner of premises at No: 111 Pitt Street, Penang.

The first defendant is the widow of one E. K. Ghany who died intestate in Penang on 14th February, 1958. She is also the administratrix of the estate of her deceased husband, but it is to be observed that although she applied

for administration on 7th November, 1958, and an order that letters of administration should issue was made in her favour on 14th December, 1958, the grant was not extracted until 18th May, 1960, the delay apparently being due to the need to settle the amount of estate duty payable.

At the time of his death the deceased Ghany was occupying the premises at No: 111 Pitt Street. He had gone into occupation as a monthly tenant of the deceased Pitchay sometime in 1940. At one time it was claimed that by reason of some transaction with a mortgagee Ghany had become the owner of the premises, but this claim has been abandoned and it is now common ground, and it was admitted by the plaintiffs in their statement of claim, that at the time of his death he was a monthly tenant. After his death his widow, who resided elsewhere than at No: 111 Pitt Street, granted sub-tenancies of portions of the premises to the second and third defendants and they are in occupation to this day. These sub-tenancies were granted in April and June, 1958, that is to say in both cases prior to the grant of letters of administration.

On assuming their administration of Pitchay's estate the plaintiffs found the second and third defendants in occupation of the premises and on 15th June, 1959, their solicitor addressed a letter to these defendants of which the following are the material portions:—

"I am instructed ..... to give you notice which I hereby do to quit and deliver peaceful vacant possession of the parts of the premises occupied by you since you have occupied the same without any tenancy lease or licence or permission of my clients.

My clients treat you as a trespasser and as such you have no right to occupy the premises or any portion thereof. TAKE NOTICE that unless you forthwith quit and deliver up peaceful vacant possession of the portion or portions of the premises occupied by you my client will take legal proceedings for recovery of possession thereof."

On 24th June 1959, a solicitor on behalf of the third defendant replied to that letter stating that his client had no knowledge of the existence of the administrators and had at all relevant times been a tenant paying rent to "the widow of the owner of the above premises". Presumably a similar letter was written on behalf of the second defendant for on 2nd July, 1959, the plaintiffs' solicitor wrote a letter to the first defendant saying that she had "wrongfully induced" the second and third defendants to accept tenancies of shops at No: 111 Pitt Street at rents of $68 and $30 a month respectively. It went on:—

"I am instructed to give you notice, which I hereby do, to require you to forthwith inform me under what authority you have granted the said tenancies (which are void), and collected the abovementioned rentals. My clients treat you and all your so-called tenants, trespassers and require you to furnish full accounts of the rents collected by you without prejudice to the right of my clients to proceed against you and persons claiming title under you for a declaration of trespass on my clients' property."

On 18th August, 1959, the plaintiffs issued a writ against all three defendants in which they claimed *inter alia* a declaration that the premises at No: 111 Pitt Street belong to and form part of the estate of Pitchay, deceased, a declaration that the second and third defendants are unlawfully occupying portions of these premises without authority, and an order for possession of the premises. A few days later a solicitor acting for all the defendants wrote to the plaintiffs' solicitor informing him that although the first defendant's petition for administration had been granted the Collector of Estate Duty had not completed his assessment and in the circumstances the first defendant could not extract the grant of administration and so put herself in a position to defend the action in a representative capacity. In the circumstances they proposed to ask for a stay of proceedings pending the extraction of the grant.

Nothing was done about this, but on 25th September, 1959, the plaintiffs asked for and obtained an order under Order 16 rule 46 appointing the first defendant to represent the estate of Ghany, deceased, in the proceedings.

The case first came on for trial on 30th November 1961, when by consent an order was made declaring that the premises at No: 111 Pitt Street belong to and form part of the estate of K. M. Pitchay, deceased, and the hearing of the remaining prayers was adjourned apparently with a view to a possible settlement.

There was no settlement and the matter again came before the Court on 16th May, 1962, when in the event Hepworth J. gave judgment for the plaintiffs for a declaration that the second and third defendants were unlawfully occupying the premises, for possession of the premises and for damages to be ascertained on inquiry.

Against that decision all the defendants have now appealed.

In his judgment the trial Judge dealt at some length with the question of how far, if at all, the defendants were entitled to the protection of the Control of Rent Ordinance. He decided that they were not entitled to any protection by reason of the Ordinance and that part of his judgment has not been substantially attacked before us. For myself I do not think the question of protection under the Ordinance arises and on this part of the case I only wish to say that although I agree with the trial Judge's conclusions I am not prepared to express any opinion as to the correctness of the reasoning which led him to these conclusions.

The trial Judge's substantial reason for allowing the plaintiffs' claim was that he took the view that until her husband's estate became vested in her as administratrix the first defendant had no power to grant sub-tenancies to the second and third defendants.

Now, there was a great deal of argument at the trial and there was a great deal of argument before us as to when that vesting took place, whether it was when the order for administration was made or whether it was when letters of administration were actually extracted. With great respect, however, the point is without importance here because the sub-tenancies were in fact granted prior to the earlier of these two dates.

It is thus clear that in April and June, 1958, that is when the sub-tenancies were granted, the estate of the deceased Ghany was not vested in the first defendant because she was not at that time in any sense the administratrix and as was said by Lord Parker of Waddington in the case of *Meyappa Chetty* v. *Supramanian Chetty*:— [1]

> "It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, ...
> .....
> An administrator, on the other hand, derives title solely under his grant."

The truth, however, is that from the time of the death of her husband the first defendant was in fact administering the estate. Her husband had been in lawful occupation of the premises and had been using them for the purposes of his business at the time of his death and whether at that time he was the owner of the premises or a contractual tenant his rights in relation to the premises *tanta et talia* were part of his estate. It was clearly for the benefit of the estate that the premises should not remain unoccupied but that some rent should be got from them. In dealing with the premises as she did the first defendant may have put herself for the time being in the position of executrix *de son tort*, but in any event there is little room for doubt that when she subsequently became administratrix her previous actions became entitled to the protection of the doctrine of relation back.

The effect of the doctrine of relation back was thus stated by Parke B., in the case of *Foster v. Bates*:— [2]

> "It is clear that the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and that he may recover against a wrong doer who has seized or converted the goods of the intestate after his death, in an action of trespass or trover. ..... The relation being established for the benefit of the intestate's estate, against a wrong doer, we do not see why it should not be equally available to enable the administrator to obtain the benefit of a contract intermediately made by suing the contracting party;"

Here the contracts of tenancy made between the first defendant and the second and third defendants respectively were clearly for the benefit of the estate. The administratrix on acquiring her title as such would have been able to sue for the rents if they had not been paid. In the circumstances I can see no reason why if her appointment related back so as to enable her to collect the rents it should not also relate back to give the second and third defendants every bit as good a title as they would have had if letters of administration had been obtained prior to the making of the tenancy contracts with them.

I do not think, however, that it is necessary to rely solely on the doctrine of relation back. It is admitted in the pleadings that at the time of his death E. K. Ghany was in occupation of the Pitt Street premises as a monthly tenant. He was not a statutory tenant. He was a contractual tenant and after his death the tenancy continued in existence for the benefit of his estate until it is terminated by notice. Admittedly it did not vest legally in the first defendant until she became administratrix. Until then it was probably vested in the Chief Justice even although the death took place prior to the coming into effect of the Probate and Administration Ordinance, 1959, on 1st February, 1960, (see *In the goods of Khoo Chow Sow* [3]).

It could, however, have been terminated by service of a notice to quit on the first defendant. In the case of *Egerton* v. *Rutter* [4] Lord Goddard C.J. quoted with approval the following passage from the judgment of the Irish Court of Exchequer in the case of *Sweeney* v. *Sweeney*:— [5]

> "Since the decision of *Rees* v. *Perrott* [6], *supra*, it has been accepted as settled law that, on the death of a tenant from year to year, the landlord is not bound to raise a personal representative to the deceased tenant as a condition precedent to the determination of the tenancy by a notice to quit: he can, in the absence of a personal representative, treat the party in possession as the tenant to all intents and purposes. The reason given for this by some is that any person holding the possession or assuming the ownership of the land may be treated as assignee of the tenant's interest."

In fact in the present case the plaintiffs did not at any time address to any person a notice to quit which was apt to terminate the tenancy of the deceased Ghany. The only letter which the plaintiffs addressed to the first defendant was that written by their solicitors on 2nd July, 1959, and although that letter says that she and the other two defendants are trespassers and calls upon her to account for the rents she has received, there is not a single word in it which could be construed as putting an end to a contract of tenancy or requiring any of the defendants to quit the premises at the expiration of any particular period of time.

The tenancy not having been determined, the true position is that the plaintiffs being reversioners have as such no title to possession and will not have until the existing tenancy is lawfully determined. That has not been done and if and when it is done will be time enough to consider the effect of any of the provisions of the Control of Rent Ordinance.

For these reasons I would allow the appeal with costs. As regards the costs in the High Court the plaintiffs are clearly entitled to these

costs down to the time they obtained the declaratory order to the effect that the premises were part of the estate. Thereafter the defendants should have their taxed costs and I would vary the order of 16th May, 1962, accordingly.

There is one further point I wish to mention and that is the great mass of unnecessary and irrelevant material that has been included in the Record of Appeal. Of the last 87 pages only two pages (pages 123 and 124) have any bearing at all on the questions at issue and I think the costs of this surplus matter should be disallowed.

Hill J.A.: I agree with the learned Chief Justice that this appeal should be allowed with costs. I also agree with the apportionment of costs proposed by him and with the disallowance of costs occasioned by surplus matter included in the Record of Appeal.

I do not wish to add anything except to say that, whatever the position may be with regard to a statutory tenancy, it seems clear that there was a contractual monthly tenancy which has never been terminated by a proper notice and that this tenancy still exists today.

Barakbah J.A.: I have had the advantage of reading my Lord Chief Justice's judgment with which I entirely agree.

In my opinion the main issue in this case was whether first defendant had acquired the right to possession of premises No. 111 Pitt Street, Penang, subsequent to the death of her husband, the said E. K. Ghany. It was admitted that the said Ghany deceased was tenant of the said premises at the time of his death. On his death the tenancy became part of his estate. The death of either party will not determine such tenancy. See *Woodfall's* Landlord and Tenant 26th Ed. Vol. 1 p. 293. The first defendant applied for letters of administration but at the time of these proceedings the grant had not yet been extracted. She took possession of the said premises and sublet them to the second and third defendants. Plaintiffs then applied to the Court that she be appointed to represent the deceased for the purpose of these proceedings and the application was granted.

The trial Judge's view was that until the first defendant had extracted the grant of letters of administration, she had no power to deal with the said tenancy by sub-letting it. Had she taken out the grant of letters of administration her title as administratrix would have related back and she would as such have been entitled to succeed to the contractual tenancy of her husband. In my opinion the mere fact that the grant of letters of administration had not yet been extracted does not necessarily mean that, to all intents and purposes, the first defendant must be regarded as a complete stranger, if the doctrine of relation back has any effect and meaning.

Now the plaintiffs purported to claim possession of the said premises from the first defendant without giving proper notice to quit. The letter dated 2nd July, 1959 written by the plaintiffs' solicitor to the first defendant was not a notice to quit. According to *Woodfall* on Landlord and Tenant 26th Ed. Vol. 1 page 980 paragraph 2127:—

> "A notice to quit is not rendered unnecessary by the death of the landlord, or of the tenant, nor by an assignment of the term, or of the reversion. In such cases notice to quit should be given by or to the person or persons for the time being legally entitled to the term, or to the reversion, as the case may be. In the case of the party dying intestate and no letters of administration having been taken out the notice should be served on the Probate judge under section 9 of the Administration of Estates Act, 1925."

According to the authorities quoted by my Lord Chief Justice a notice to quit could have been served on the first defendant, thereby determining the tenancy. It would appear that this had not been done.

With regard to the second and third defendants assuming that they were sub-tenants, notice on them would be irregular as a notice to quit given by the landlord should be given to his immediate tenant or to his assignee but not to a sub-tenant. — *Pleasant, Lessee of Hayton* v. *Benson.* (7)

For the reasons above stated I would allow the appeal with costs in terms as proposed by my Lord Chief Justice.

Appeal allowed.

Solicitors: *S. Thillaimuthu; Ong Huck Lim & Co.*

Re CHOW KIM LIN

[R. Cr. J. (Ong J.) November 17, 1962]

[K.L. — Criminal Revision No. 14 of 1962]

Criminal Procedure — Preliminary inquiry — Functions of Magistrate — Criminal Procedure Code (Cap. 6), Ch. XVII, s.173(f).

In a preliminary inquiry a Magistrate ought to commit when the evidence of credible witnesses which if believed would sustain a conviction.

Penal Code, s.376 — Rape — Chemist's report.

Cases referred to:—

(1) *Theopillai* v. *Public Prosecutor* [1956] M.L.J. 177.

(2) *Re Osman bin Abdullah* [1954] M.L.J. 237.

(3) *Ramgopal Ganpatrai Ruia* v. *State of Bombay* A.I.R. 1958 S.C. 97; [1958] S.C.R. 618.

(4) *Queen Empress* v. *Namdov Satvaii* I.L.R. 11 Bom. 372.

CRIMINAL REVISION.

Ong J.: On October 20, 1962 a Magistrate holding a preliminary inquiry into a charge of rape under section 376 of the Penal Code made an order discharging the person accused of that offence. The grounds of decision ran to eleven pages and took time to write. On November 15 the Public Prosecutor filed a petition for revision. This, of course, is the proper step to take, having regard to what was said by the Court of Appeal in *Theopillai* v. *Public Prosecutor* (1).